Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-391

I. HARRY LYON; MICHAEL D. BLALOCK,

Petitioners,

v.

ALABAMA STATE BAR,

Respondent.

BRIEF OF RESPONDENT

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INTRODUCTION

The pending Petition for Writ of Certiorari presents the very narrow issue of whether or not the Supreme Court of Alabama in the case of I. Harry Lyon and Michael D. Blalock v. Alabama State Bar,

451 So. 2d 1367, (1984) Pet. for Cert. A1-13, has decided a federal question of substance in a way probably not in accord with applicable decisions of the Supreme Court of the United States. Only one Disciplinary Rule of the Code of Professional Responsibility of the the Alabama State Bar is challenged, namely, Disciplinary Rule 2-102(A)(7)(f) which requires attorney advertising to include a warning or disclaimer so as to assure that the consumer is not misled. The Supreme Court of Alabama in arriving at the conclusion that Disciplinary Rule 2-102(A)(7)(f) is constitutionally valid relied upon certain express language contained in Bates et. al. v. State Bar of Arizona, 433 U.S. 350 (1977), Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) and In Re R.M.J., 455 U.S. 191 (1982). The Petitioners have demonstrated no special and important rea-

sons for granting the writ of certiorari and the same should be denied.

QUESTION PRESENTED FOR REVIEW

Disciplinary Rule 2-102(A)(7)(f), Code of Professional Responsibility of the Alabama State Bar, which does not restrict the content, time, place or manner of attorney advertising, but merely follows the mandate, directive or suggestion of the Supreme Court of the United States by requiring a warning or disclaimer so as to assure that the consumer is not misled, does not abridge freedom of speech or of the press in violation of the First Amendment, made applicable to the States through the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

(1) First Amendment, Constitution of the United States, Fourteenth Amendment, Con-

stitution of the United States. (Petition for Writ of Certiorari, pp. 2-3)

(2) Rule 19, Rules of the Supreme Court of the United States, in pertinent part provides:

> "A review on writ of certiorari is not a matter of right, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."
>
> * * *

(3) Disciplinary Rule 2-102(A)(7)(f), Code of Professional Responsibility of the Alabama State Bar, provided:

> "No advertisement shall be published unless it contains, in legible print, the following language:

> 'No representation is made about the quality of legal services to be performed or the expertise of the lawyer performing such services.'"

(On January 26, 1983, there was an amendment to this Rule which is immaterial to these proceedings.)

STATEMENT OF THE CASE

The Respondent will not again outline the steps which culminated in the decision and opinion of the Supreme Court of Alabama rendered on May 11, 1984. The opinion describes the history of the case accurately. (Petition for Writ of Certiorari, A1-13)

ARGUMENT

REASONS FOR DENYING THE WRIT

Of course, the seminal case in the area of attorney advertising is Bates et al.

v. State Bar of Arizona, supra. This Court held that a blanket ban on all attorney advertising of prices for certain routine services was unconstitutional. However, this Court was careful to observe that it is the bar's role to assure that the populace is sufficiently informed as to enable it to place attorney advertising in its proper perspective. In the majority opinion this Court observed:

* * *

> "Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." (emphasis added) 433 U.S. at 375

* * *

This Court was careful to describe some of the clearly permissible limitations on advertising not foreclosed by the Court's holding. In the opinion the Court stated:

> * * *
>
> "In holding that advertising by attorneys may not be subject to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding. (emphasis added) 433 U.S. at 383
>
> * * *
>
> ...because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services - a matter we do not address today - are not susceptible of measure-

ment or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.

* * *

We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled. In sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play, in assuring that advertising by attorneys flows both freely and cleanly." (emphasis added) 433 U.S. at 383-384

Justice Powell, concurring in part and dissenting in part, observed:

* * *

"...the Court notes that it has not addressed 'the peculiar problems associated with advertising claims re-

> lating to the quality of legal services.' Ante, at 366. There are inherent questions of quality in almost any type of price advertising by lawyers, and I do not view appellants' advertisement as entirely free from quality implications. (emphasis in original) 433 U.S. at 400
>
> * * *
>
> ...the Court's opinion does not 'foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled.' Ante, at 384. I view this as at least some recognition of the petential for deception inherent in fixed-price advertising of specific legal services." 433 U.S. at 402
>
> * * *

It is significant that the Supreme Court of Alabama in upholding the constitutionality of Disciplinary Rule 2-102(A)(7)(f) applied the four-part analysis as

enunciated by the Supreme Court of the United States in Central Gas & Electric Corp. v. Public Service Commission of New York, supra. At page 1372, 451 So. 2d the Supreme Court of Alabama quotes from Central Hudson Gas & Electric Corp. v. Public Service Commission of New York as follows:

> "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." Pet. for Cert. A 11

The Court in Central Hudson Gas & Electric Corp. v. Public Service Commission

of New York, supra, makes specific reference to Bates et al. v. State Bar of Arizona, supra, observing:

> * * *
>
> "...there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.
>
> * * *
>
> ...in Bates the Court explicitly did not 'foreclose the possibility that some limited supplementation, by way, of warning or disclaimer or the like, might be required' in promotional materials." 447 U.S. at 565
>
> * * *

In the case of In Re R.M.J., supra, the Court considered the validity of a disclaimer similar to that required by Disciplinary Rule 1-102(A)(7)(f), Code of Professional

Responsibility of the Alabama State Bar. A Rule of the Supreme Court of Missouri provided that an attorney could advertise in certain areas or fields of law but provided:

> "If one or more of these specific areas of practice are used in any advertisement, the following statement must be included ...:
>
> 'Listing of the above areas of practice does not indicate any certification of expertise therein.'" 455 U.S. at 195-196 note 6

* * *

The attorney involved in the case of In Re R.M.J., supra, was charged with violating several of the Disciplinary Rules of the Supreme Court of Missouri relating to advertising. The attorney challenged the constitutionality of these Rules, but did not contend that the Rule requiring the disclaimer was unconstitutional. Neverthe-

less, the Court discussed the validity of such a disclaimer requirement as follows:

> * * *
>
> "...the decision in Bates nevertheless was a narrow one. The Court emphasized that advertising by lawyers still could be regulated. 455 U.S. at 200
>
> * * *
>
> Even as to price advertising, the Court suggested that some regulation would be permissible. For example, the bar may 'define the services that must be included in an advertised package ...' 433 U.S. at 373, n. 28, and the bar could require disclaimers or explanations to avoid false hopes, id., at 384. ('[S]ome limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled'). 455 U.S. at 200 note 11
>
> * * *
>
> ...the Court noted that a warning or disclaimer might

be appropriately required, even in the context of advertising as to price, in order to dissipate the possibility of consumer confusion or deception.' [T]he bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, [although] the preferred remedy is more disclosure, rather than less.' (emphasis added) 455 U.S. at 201

* * *

In short, although the Court in Bates was not persuaded that price advertising for 'routine' services was necessarily or inherently misleading, and although the Court was not receptive to other justifications for restricting such advertising, it did not by any means foreclose restrictions on potentially or demonstrably misleading advertising. Indeed, the Court recognized the special possibilities for deception presented by advertising for professional services. The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the

> 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling.
>
> * * *
>
> ...the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in Bates suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 455 U.S. at 203
>
> * * *
>
> Appellant makes no challenge to the constitutionality of the disclaimer requirement, and we pass on to the remaining three infractions." 455 U.S. at 204

The Supreme Court of Alabama considered a challenge to the constitutionality

of Disciplinary Rule 2-102(A)(7)(f), Code of Professional Responsibility of the Alabama State Bar, in the case of Mezrano v. Alabama State Bar, 434 So. 2d 732 (Ala. 1983) (As hereinabove noted, an amendment was added to the Rule January 26, 1983, which is immaterial insofar as these proceedings are concerned).Relying upon statements contained in the opinions in Bates et al. v. State Bar of Arizona, supra, and In Re R.M.J., supra, the Supreme Court of Alabama concluded that the Rule is constitutional,observing:

* * *

> "The Alabama Bar Association has no rating system. Applicants for bar admission in this state do not receive their scores on the bar examination if they pass. The Alabama Bar does not identify attorneys as specialists. Therefore, we feel that attorney's representations about the quality of their legal services could very well mislead the public. Upon passing the bar examina-

> tion, all attorneys are presumed to be on an equal footing. Thus, the Alabama State Bar could reasonably conclude that attorneys should not hold themselves out as being superior to other attorneys when there is no rating system in this state." 434 So. 2d at 735
>
> * * *

Carefully applying the test described in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, supra, the Supreme Court of Alabama in the instant case upheld the validity of Disciplinary Rule 2-102(A)(7)(f), Code of Professional Responsibility of the Alabama State Bar, concluding:

> * * *
>
> "Implicit in our holding in Mezrano is that any type of price advertising by attorneys involves inherent questions of quality.
>
> * * *
>
> Furthermore, it is reasonable to assume that

> some readers of an advertisement, such as the one presently before us, might believe that the attorney is a specialist or has greater expertise in performing the services advertised than attorneys who do not advertise. Accordingly, we upheld the disclaimer requirement in Mezrano because of the Bar's substantial interest in preventing the public from being misled. This restriction meets the requirements of Central Hudson Gas and R.M.J. because the disclaimer is directly related to that interest, and it is not more extensive than necessary to serve that interest." 451 So. 2d at 1373, Pet. for Cert. A 12

* * *

CONCLUSION

The Supreme Court of Alabama has carefully followed the precedents and guidelines set by the Supreme Court of the United States and the writ of certiorari should be denied.

Respectfully submitted,

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General Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Respondent has been served upon I. Harry Lyon and Michael D. Blalock, 2900 Linden Avenue, Birmingham, Alabama, 35209, by United States mail, postage prepaid, this 30th day of August, 1984.

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